RECORD AND BRIEFS

No. 15-680

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IN THE

Supreme Court of the United States

GOLDEN BETHUNE-HILL, *et al.*,

Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

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1. Petitioners' and Respondents' written letters of consent to amicus briefs have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for amici authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity—other than *amici*, their members, and their counsel—contributed monetarily to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In the wake of *Shaw v. Reno*, 509 U.S. 630 (1993), this Court laid out a clear and workable standard for determining whether an election district is a racial classification subject to strict scrutiny. *See Miller v. Johnson*, 515 U.S. 500 (1996). Under the *Miller* framework, the vitality of which was recently reaffirmed in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), a plaintiff has the burden to show that race was the *predominant* factor motivating a legislature's decision to place a significant number of voters within or without a particular district. *Miller*, 515 U.S. at 916. To make this showing—and to trigger strict scrutiny—the plaintiff must prove that the legislature *subordinated* traditional race-neutral districting principles to racial considerations. *Id.*

The *Miller/Alabama* framework takes into account the challenging realties of drawing election districts, including that states often *must* consider race in drawing majority-minority districts. Thus, this Court has never subjected a redistricting plan to strict scrutiny solely based on a state's decision to achieve a particular racial percentage within a particular district, and *amicus* urges this Court not to do so in this case. Rather, the Court should reaffirm that the primary consideration is whether, on a district-by-district basis, "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller*, 515 U.S. at 916. Only in those districts where race predominated should strict scrutiny apply.

Indeed, it is the implementation of the state's target policy, and not the fact that the state had targets *ab initio*, that ultimately determines whether particular districts are racial classifications. That a state set a population target for a district is not a basis for subjecting that district to strict scrutiny if the challenged district does not offend traditional districting principles. For example, a state that sets a 55 percent "target" for a majority-minority district does not trigger strict scrutiny, so long as the district unites a reasonably compact minority population along local political boundaries, and the district is not dramatically irregular in its overall shape.

Further, the District Court in this case concluded that a finding of predominance under *Miller* "demands *actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that *per force* results in the conclusion that the traditional criteria have been subordinated to race." J.S. App. at 1-2 (internal quotations omitted).[2] This Court has never articulated the *Miller/Alabama* standard in these precise terms, and the record below makes it difficult to discern exactly how the District Court applied the "actual conflict" standard. If the District Court's adoption of the "actual conflict" standard is consistent with this Court's *Miller/Alabama* framework, then the application of this standard is perhaps just another way of analyzing whether the legislature, in a particular instance, subordinated traditional race-neutral districting principles to racial considerations. Nevertheless, because it is unclear from the District Court's opinion how the

2. "J.S. App." refers to the Appendix attached to the Appellants' Jurisdictional Statement.

"actual conflict" predominance standard was applied, and whether its application is consistent with *Miller/Alabama*, guidance from this Court would be helpful to district courts around the nation. In this regard, *amicus* was unable to determine from the record below whether Appellants submitted evidence regarding subordination that the District Court did not review or fairly assess.

In its analysis of House District No. 75 (the only district where the District Court found that race had predominated over traditional districting principles), the District Court correctly held that compliance with the VRA *can* be a compelling state interest. A majority of the members of the current Court have supported this view, and this holding by the District Court should not be disturbed.

While the District Court correctly determined that compliance with the VRA can be a compelling state interest, its description of how it applied strict scrutiny is confusing, particularly with regard to its treatment of "narrow tailoring." The District Court appears in places to conflate the predominance inquiry for triggering strict scrutiny with the narrow tailoring inquiry for a district already subject to strict scrutiny. The District Court also held that a state must prove that "its own departure from non-racial criteria was not substantial." This requirement is not supported by this Court's jurisprudence and could—depending on how one interprets the requirement—lead to incorrect results. Rather, it has always been the law that election districts may reasonably depart from traditional redistricting principles, such as compactness or governmental boundaries, to comply with the VRA. In other words, a district may depart from traditional

redistricting principles where reasonably necessary. Under the District Court's reasoning, VRA compliance will always be a prisoner to the "non-substantial" requirement, which may render an otherwise reasonably necessary departure unconstitutional. Respectfully, this Court should take the opportunity to amplify its holding in *Alabama* with regard to the application of strict scrutiny.

ARGUMENT

I. THIS COURT HAS SET FORTH A CLEAR AND WORKABLE STANDARD FOR DETERMINING WHETHER AN ELECTION DISTRICT IS A RACIAL CLASSIFICATION SUBJECT TO STRICT SCRUTINY

A. Courts Must Apply the Analysis Set Forth in *Miller* to Determine Whether a Challenged Election District is a Racial Classification Subject to Strict Scrutiny

The Equal Protection Clause prohibits states from classifying citizens by race, including adopting electoral redistricting schemes based on racial characteristics without adequate justification. *See Shaw*, 509 U.S. at 645. To demonstrate that a district violates the Equal Protection Clause, a plaintiff must first show that race was the predominant factor in how the legislature drew district lines. *Miller*, 515 U.S. at 916. If a plaintiff makes this showing, the Court then employs its "strictest scrutiny" to determine whether the redistricting plan was narrowly tailored to further a compelling state interest. *Id.*

In *Miller*, the Court set forth the analytic framework for determining when a state electoral districting plan triggers strict scrutiny under the Equal Protection Clause:

> The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared

> interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines.

Miller, 515 U.S. at 915-16 (quoting *Shaw*, 509 U.S. at 646-47 (internal citations omitted)); *see also Alabama*, 135 S. Ct. at 1264; *Easley v. Cromartie*, 532 U.S. 234, 1458 (2001).

The *Miller* framework, which the Court applied last year in *Alabama*, requires the district court to review each potentially problematic district separately. *See Alabama*, 135 S. Ct. at 1265. This district-by-district review requires an analysis of, among other things, the shape, compactness and contiguity of the district, respect for traditional political subdivisions, demographics and other factors. *See Shaw*, 509 U.S. at 646; *Miller*, 515 U.S. at 916. The Court in *Miller* set forth a clear and workable rule: a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. *Id.*

B. The Use of a Targeted Racial Percentage Does Not, In and of Itself, Trigger Strict Scrutiny

Appellants present the following question for this Court's review:

> 2. Did the court below err by concluding that the admitted use of a one-size-fits-all 55% black

voting age population floor to draw twelve separate House of Delegates districts does not amount to racial predominance and trigger strict scrutiny?

The answer to that question should be "no." Strict scrutiny review is triggered only where a district court determines that race predominated over the other traditional districting factors in drawing the particular district and, in doing so, subordinated all of those other traditional, race-neutral factors. *Miller*, 515 U.S. at 916.

In determining whether racial considerations predominated, the analysis begins with an objective spatial analysis of the district and its minority population. It focuses on whether the geography of the challenged district appears to be a racially-identifiable departure from what would normally be expected from a compact and contiguous district, and whether something has distorted the district's configuration along racial lines. The analysis requires consideration of the compactness and dispersal of the minority population within a district, for example whether the minority population is connected by artifices such as land bridges or relies on point contiguity that would not normally be employed. *See Shaw*, 509 U.S. at 646; *Miller*, 515 U.S. at 917. The analysis also includes looking for patterns of racially-correlated splitting of political units that are normally kept intact. *See Bush v. Vera*, 517 U.S. 952, 974 (1996).

Applying these standards, this Court has never applied strict scrutiny solely upon a state's decision to achieve a particular racial percentage within a particular district. *See Alabama*, 135 S. Ct. at 1272 (citing *Vera*, 517

U.S. at 996); *Shaw*, 509 U.S. at 649. Rather, strict scrutiny may be triggered by individual or collective objective facts such as whether the district exhibits widely dispersed pockets of minority population, highly irregular district boundaries, and extensive splits of political units. *Id.* at 645 (12th Congressional District in North Carolina); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Cromartie*, 532 U.S. 234 (same); *United States v. Hays*, 515 U.S. 737, 741-742 (1995) (2nd and 4th Congressional Districts in Louisiana); *Miller*, 515 U.S. 900 (11th Congressional District in Georgia); *Abrams v. Johnson*, 521 U.S. 74, 77-78 (1997) (2nd and 11th Congressional Districts in Georgia); *Vera*, 517 U.S. 952 (18th, 29th and 30th Congressional Districts in Texas). *See also King v. Illinois State Bd. of Elections*, 522 U.S. 1087 (1998) (summarily affirming three judge court decision concerning 4th Congressional District in Illinois).

The districts that have been subjected to strict scrutiny under *Shaw* had the following common elements: they achieved a majority-minority population percentage by (a) uniting widely-separated minority population concentrations using geographical contrivances such as "land bridges," narrow fingers, wings or other unusually-shaped appendages or connectors that distorted the perimeter of the district, and/or (b) they split numerous political units such as counties, cities or voting precincts in a racially disparate way. *See Vera*, 517 U.S at 974; *Miller*, 515 U.S. at 917; *Shaw*, 509 U.S. at 630.

These objective factors assume primary importance, because "reapportionment is one area in which appearances do matter." *Shaw*, 509 U.S. at 647. In some cases, this objective inquiry is enough to demonstrate that a state

engaged in an unlawful racial gerrymander. *Id.* at 646-47 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). In many cases, however, the analysis requires looking into the legislative process to see if racial considerations are responsible for the district's configuration. This inquiry searches for any contemporaneous statements of legislative purpose and post-hoc testimony suggesting that race played an undue role in districting decisions. *See Miller*, 515 U.S. at 917-18.

Evidence that a state set a minority population target for a district may be one consideration in finding that race was causally related to a departure from traditional districting principles. But it would short-circuit *Miller*'s carefully constructed analytical framework to treat a population target as a racial classification *per se*. When a state professes to target a majority-minority district generally (a district with a 50 percent or greater minority population) or a specific percentage (as in this case), there is no reason to conclude that those goals are incompatible with traditional districting principles or that the resulting plan will suffer in any way. *See Shaw*, 509 U.S. at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.").

An election district's minority percentage is not mathematical evidence of racially driven distortions of district boundaries. Reaching a 40 percent minority target might require extensive geographic contrivances in one region, whereas in another region a 60 percent minority district could be the natural result of following traditional districting principles to the letter. In other regions, a state

might have to violate traditional districting principles in order to prevent the creation of a 75 percent minority district. Needless to say, a district with a 70 percent minority population does not necessarily involve twice the racially driven boundary manipulations of a 35 percent minority district; neither figure in and of itself indicates that any unusual boundary manipulations occurred.

When adhering to the bounds of traditional districting criteria, some districts may be majority-black and others majority-white, but for constitutional purposes they are just districts. There is no constitutional basis to deem majority-white election districts as normative, or to presuppose that majority-minority election districts deviate from the norm. Such a rule would abandon this Court's understanding of equal protection because it would create explicitly different rules for black and white citizens.

During the redistricting process, any state with a sizable minority population will assuredly be aware of the racial consequences of its boundary changes, particularly where the racial composition of its districts has a predictable and substantial electoral impact. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Shaw*, 509 U.S. at 646 ("[T]he legislature always is aware of race when it draws district lines .... That sort of race consciousness does not lead inevitably to impermissible race discrimination."). It is unrealistic to expect that prohibiting states from acknowledging racial compositions in their redistricting decisions will prevent states from ever being aware of

the racial impact of these decisions, and may, in fact, encourage subterfuge and opacity in the redistricting process.

The structure of the *Miller/Alabama* test is faithful to this Court's general framework for discerning when facially neutral laws have a discriminatory purpose in violation of the Fourteenth Amendment. *See Shaw*, 509 U.S. at 643 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). When searching for an invidious discriminatory purpose, "[t]he impact of the official action—whether it 'bears more heavily on one race than another[]' . . . may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). After analyzing the objective impact of a law, courts consider other evidence, including "legislative or administrative history . . . , especially . . . contemporary statements by members of the decision making body." *Arlington Heights*, 429 U.S. at 268. Therefore, inquiries into whether a facially-neutral state action—redistricting or otherwise—was motivated by unjustified racial considerations begin with an objective analysis before probing the legislative record for indicia of improper purpose.

By relying on *Miller*'s objective factors, courts can better distinguish those cases where piercing the veil of the legislative process is appropriate. If an objective analysis of a challenged district's geography provides a strong basis to infer racial gerrymandering, then discovery into the state's legislative process would be warranted notwithstanding assertions of legislative privilege.

The *Miller/Alabama* test strikes a careful balance that furthers the Fourteenth Amendment's guarantee of fair political participation free of unjustified racial classification while adhering to judicial respect for state legislatures undertaking the difficult task of redistricting. This framework remains an effective safeguard of constitutional rights, and this Court need not expand the circumstances under which an electoral district must be subjected to strict scrutiny.

C. It is Unclear Whether the District Court's "Actual Conflict" Legal Standard is Consistent with the Well-Established *Miller/Alabama* Framework

The District Court held that it was:

> the burden of the Plaintiffs to prove by a preponderance of the evidence that race was the predominate factor motivating the decision to place a significant number of voters within or without a particular district in that, as to each of those districts, Virginia's General Assembly subordinated race-neutral districting principles to racial considerations when forming the district.

J.S. App. at 1-2. The District Court further concluded that such a finding "demands '*actual* conflict between traditional redistricting criteria and race that leads to the subordination of the former, rather than a merely hypothetical conflict that *per force* results in the conclusion that the traditional criteria have been subordinated to race.'" *Id.* at 5 (quoting *Page v. Virginia State Bd. of*

Elections, No. 3:13CV678, 2015 WL 3604029, at *27 (E.D. Va. 2015) (Payne, J., dissenting)) (emphasis in original). Applying this legal standard, the District Court held that "plaintiffs have not carried that burden and that race was not shown to have been the predominant factor in the creation of eleven of the twelve Challenged Districts." J.S. App. at 2.

It is unclear from the record whether the District Court's use of the "actual conflict" standard differs in any material way from the *Miller/Alabama* framework. Certainly, the *Miller/Alabama* predominance inquiry has never explicitly required that the use of race in drawing district boundaries be in "actual conflict" with traditional districting criteria. But this is not to say that such an "actual conflict" standard is erroneous as a matter of law. Rather, if the District Court's adoption and application of the "actual conflict" standard is consistent with this Court's *Miller/Alabama* framework, then the application of this standard is perhaps just another way of analyzing whether the legislature, with regard to a particular district, subordinated traditional race-neutral districting principles to racial considerations. *See Miller*, 515 U.S. at 916.

Under the *Miller/Alabama* framework, plaintiffs in racial gerrymandering cases must prove that racial considerations predominated over traditional race-neutral districting criteria. To make this showing, plaintiffs must provide actual proof, typically in the form of expert testimony, that traditional principles were subordinated to race in the drawing of a particular district. *See, e.g.*, *Alabama*, 135 S. Ct. at 1265-68; *Miller*, 515 U.S. at 916; *Vera*, 517 U.S. at 965; *Shaw*, 509 U.S. at 649. Absent such actual proof, strict scrutiny will not be triggered. Accordingly, the line courts draw in racial gerrymandering

cases already requires that plaintiffs show that racial considerations are in conflict with traditional race-neutral districting principles.

Still, in formulating the "actual conflict" standard, the District Court provided minimal analysis as to how it was applied; and, in support of its use, the court cited only Judge Payne's dissent in *Page*, 2015 WL 3604029, at *27 (Payne, J., dissenting). Thus, it is unclear from the record how the "actual conflict" standard was applied, whether the use of the standard affected the District Court's conclusions, whether the standard is helpful in any way, and whether the standard is consistent with the *Miller/Alabama* predominance inquiry. Accordingly, this Court should take the opportunity to clarify how the *Miller/Alabama* framework should be applied in cases like this.[3]

II. COMPLIANCE WITH THE VOTING RIGHTS ACT IS A COMPELLING STATE INTEREST

The Voting Rights Act of 1965 was enacted to "address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'" *Shelby County*, 133 S. Ct. at 2618 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (internal quotations omitted). The VRA prohibits states from adopting plans that would result in vote dilution under Section 2 or (prior to *Shelby County*) in covered jurisdictions, retrogression under Section 5.

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3. Again, in this regard, *amicus* has been unable to determine from the record whether Appellants submitted evidence as to subordination that the District Court did not review or fairly assess.

Members of this Court, including the majority of the current Court, have long assumed that compliance with the VRA is a compelling state interest. *See, e.g.*, *Vera*, 517 U.S. at 977 (O'Connor, J., for the plurality, joined by Chief Justice Rehnquist and Justice Kennedy) ("[W]e assume without deciding that compliance with the results test [of Section 2 of the VRA] . . . can be a compelling state interest."); *id.* at 992 (O'Connor, J., concurring) ("In my view . . . the States have a compelling interest in complying with the results test [of the VRA] as this Court has interpreted it."); *id.* at 1033 (Stevens, J., dissenting, joined by Justices Ginsburg and Breyer) ("The plurality begins with the perfectly obvious assumption[] that a State has a compelling interest in complying with § 2 of the Voting Right Act."); *Shaw v. Hunt*, 517 U.S. 899 (Rehnquist, C.J.) (assuming but not deciding that VRA compliance can be a compelling interest); *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Roberts, Justice Thomas and Justice Alito) ("I would hold that compliance with § 5 of the Voting Rights Act can be [a compelling state] interest.").

The majority and dissent below also agreed that compliance with the VRA is a compelling state interest. *See* J.S. App. at 76-77 (majority); *id.* at 144 (dissent). Judge Payne, for the majority, adopted Justice Scalia's rationale in *LULAC*, holding generally that Section 5 is a compelling state interest:

> We long ago upheld the constitutionality of § 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment to enforce that Amendment's prohibition on the

> denial or abridgment of the right to vote. If compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause.

J.S. App. at 76 (quoting *LULAC*, 548 U.S. at 518 (internal citations omitted)). Judge Payne also found the same rationale persuasive with regard to Section 2. *Id.* at 77, n. 23 (citing *Vera*, 517 U.S. at 990-92 (O'Connor, J., concurring)).

Section 2 of the VRA prohibits (among other things) redistricting that results in dilution of minority voting strength, whether or not the legislature intended such a result. *See* 52 U.S.C. § 10301; *see also Shaw*, 509 U.S. at 641; *Gingles*, 478 U.S. 30 (applying Section 2 to vote-dilution claim involving multimember districts); *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (single-member districts). This Court has made clear that Section 2 is "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights." *Vera*, 517 U.S. at 992 (O'Connor, J. concurring) (internal citations omitted). The "results" test of Section 2 is necessary because, without it, "nothing could be done about overwhelming evidence of unequal access to the electoral system" or about "voting practices and procedures that perpetuate the effects of past purposeful discrimination." *Id.*

With respect to Virginia's post-2010 census redistricting, and for all redistricting that occurred before this Court decided *Shelby County*, Section 5 of the VRA is also a compelling state interest. Section

5 "prohibits a covered jurisdiction from adopting any change that 'has the purpose of or will have the effect of diminishing the ability of the minority group to elect their preferred candidates of choice.'" *Alabama*, 135 S. Ct. at 1272 (alteration in original) (quoting 52 U.S.C. § 10304(b)). Although the Court in *Shelby County* left Section 5 functionally inoperative on a going-forward basis, *Shelby County* has not, and should not, be found to apply retroactively. As the Court noted in *Harris v. Arizona Indep. Redistricting Comm'n*:

> Appellants point to [Shelby County], in which this Court held unconstitutional sections of the Voting Rights Act that are relevant to this case. Appellants contend that, as a result of that holding, Arizona's attempt to comply with the Act could not have been a legitimate state interest. The Court decided *Shelby County*, however, in 2013. Arizona created the plan at issue here in 2010. At the time, Arizona was subject to the Voting Rights Act, and we have never suggested the contrary.

136 S. Ct. 1301, 1310 (2016); *see also Alabama*, 135 S. Ct. at 1274 (declining to decide whether "continued compliance with § 5 remains a compelling interest" following *Shelby County*). Moreover, the Court in *Shelby County*, in finding Section 4(b) of the VRA unconstitutional, clarified that is "issue[d] no holding on § 5 itself, only the formula." 133 S. Ct. at 2631.[4]

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4. The District Court and other district courts have also held that *Shelby County* does not apply retroactively. *See* J.S. App. at 11, n. 4; *see also, e.g.*, *Covington v. N. Carolina*, No. 1:15-CV-399, 2016 WL 4257351, at *2 (M.D.N.C. Aug. 11, 2016).

This Court has long recognized that the right to vote is sacrosanct and "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). When Congress enacted the VRA, it acted to confront discrimination relating to that sacred and fundamental right. The VRA, therefore, stands as among the most important acts in the history of our nation. A state's compliance with the VRA almost by definition should be considered a compelling government interest.

III. THE DISTRICT COURT'S STRICT SCRUTINY ANALYSIS NEEDS CLARIFICATION

While the District Court correctly found that compliance with the VRA can be a compelling state interest with regard to House District No. 75, its description of how it applied strict scrutiny is confusing, particularly with regard to its treatment of "narrow tailoring." Respectfully, this Court should take the opportunity to amplify its holding in *Alabama* with regard to the application of strict scrutiny.

The District Court, in holding that compliance with Section 5 could be a compelling state interest, tacked on the "proviso that the State's interest must be in *actual* compliance with the standards articulated in federal antidiscrimination law as interpreted by the federal courts." J.S. App. at 77 (emphasis in original). The District Court's "proviso" draws a distinction between "actual compliance" with the VRA as a compelling state interest, and, what it terms "defensive compliance," which is not. "Defensive compliance" is a state's "interest in avoiding preclearance denial under Section 5 (or liability under Section 2)." *Id.* Such "defensive compliance could often

entail a violation of constitutional law itself subordinating traditional, neutral criteria and other districting criteria to racial considerations." *Id.* at 77-78 (citing *Harris v. Arizona Indep. Redistricting Comm'n*, 993 F.Supp.2d 1042, 1054-55 (D.Ariz. 2014) (noting that "[s]everal aspects of the preclearance process . . . may work together to . . . encourage a state that wants to obtain preclearance to overshoot the mark, particularly if it wants its first submission to be approved").

In order to effectuate this distinction, the District Court requires that:

> [F]or *predominance*, the inquiry is whether, as a matter of fact, the State substantially disregarded non-racial criteria. For *narrow tailoring*, the inquiry is whether the State had good reason to believe that its actions were required for *actual* compliance with the non-dilution or non-retrogression standard. Because substantial disregard of non-racial criteria is not required under a *constitutional* reading of either standard, this inquiry necessarily entails also asking whether the State had good reason to believe that its own departure from non-racial criteria was not substantial.

Id. at 81 (emphasis in original). These requirements appear to conflate the predominance inquiry with the separate strict scrutiny inquiry. The District Court's "proviso" is not supported by this Court's cases and could—depending on how one interprets the "proviso"—lead to incorrect results.

There are circumstances, for example, where a majority-minority district may require a "substantial," but reasonably necessary, departure from traditional districting principals. But under a literal reading of the District Court's "proviso," such otherwise constitutional districts could not survive strict scrutiny.

Moreover, this Court's recent discussion of strict scrutiny in *Alabama* addresses the District Court's concern where a state subordinates traditional districting principals to achieve "defensive compliance" with the VRA. A "court's analysis of the narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (citing *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009)). "This standard does not demand that a state's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid. And legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* (internal citations and quotations omitted).

The case law does not require the state to prove that "its own departure from non-racial criteria was not substantial." J.S. App. at 81. If race predominates over non-racial criteria, then in some sense the departure is always "substantial." It also has never been the law that VRA remedies cannot make reasonable departures from compactness or governmental boundaries. *See Vera*, 517 U.S. at 979 ("[A] district drawn in order to satisfy [the VRA] must not subordinate traditional districting

principles to race substantially more than is '*reasonably necessary*' to avoid [VRA] liability.") (emphasis added); *Shaw*, 509 U.S. at 655 ("A reapportionment plan [is] not . . . narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.") A "substantial" departure from non-racial criteria may be "reasonably necessary" to ensure compliance with Section 2 or Section 5 in certain cases. But under the District Court's reasoning, VRA compliance will always be a prisoner to the "non-substantial" requirement.

King v. Illinois State Bd. of Elections helps illustrate the problem with the District Court's approach. 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087. In *King*, the district court—applying the *Miller* predominance analysis—held that a majority-Latino district in Chicago was subject to strict scrutiny because the district's convoluted boundaries were chosen predominantly to unite Latino populations. The three-judge court then found that this arrangement was a narrowly tailored response to a very specific geographical dilemma, namely that the African American population in Cook County was sufficiently numerous to maintain three reasonably compact majority-black congressional districts, and that the Latino population was sufficiently numerous to draw a reasonably compact majority-Latino congressional district, but that at least one district had to be non-compact for all four to coexist. Finding that Section 2 provided a compelling reason to draw three majority-black districts and one majority Latino district, the district court found that, because the challenged district was non-compact only to the extent needed to perform an "end-run" that linked together geographically-proximate Latino neighborhoods (between which an existing majority-black congressional district lay), it was therefore narrowly-tailored and constitutional. *Id.* at 623-626.

The majority-Latino district in *King* was a "substantial" departure from traditional districting criteria, but under these circumstances it was a narrowly tailored solution to ensure Section 2 compliance. This constitutional district would not survive the District Court's standard.

The "fundamental concerns of federalism mandate that States be given some leeway so that they are not trapped between the competing hazards of liability." *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (finding that Section 2 is a compelling state interest); *see also LULAC*, 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Roberts, Justice Thomas and Justice Alito) ("[i]f compliance with [Section 5 of the VRA] were not a compelling state interest, then a State could be placed in the impossible position of having to choose," between compliance with the VRA and compliance with *Shaw* and its progeny.).

To be clear, "VRA compliance" does not give a legislature a license to disregard traditional districting standards. Far from it. Indeed, if a case involves the question of VRA compliance, it is already a case where strict scrutiny has been invoked. And, of course, a "reapportionment plan [is] not . . . narrowly tailored to the goal of avoiding retrogression [under Section 5] if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw*, 509 U.S. at 655. In other words, Section 5 does not "give covered jurisdictions carte blanche to engage in racial gerrymandering in the name of non-retrogression." *Id.* But, in some cases, a "substantial" departure from traditional districting criteria may be "reasonably necessary" for a state to comply with the VRA. *Shaw* and its progeny do not prevent, and, in fact, may actually require this result.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reaffirm the principles it has set forth in prior cases, including, that: (1) a district is constitutional absent a showing that traditional districting principles were subordinated to race; (2) evidence of a target racial percentage, while relevant, is not sufficient to establish that traditional districting principles were subordinated to race; (3) where strict scrutiny applies, the Voting Rights Act can serve as a compelling state interest; and (4) a district is narrowly tailored if it does not subordinate traditional districting principles to race substantially more than is '*reasonably necessary*' and there is a strong basis in evidence that to do otherwise would have violated the Voting Rights Act.

Respectfully submitted,

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